



1 granting respondent's motion to dismiss Grounds One and Two with leave to amend.  
 2 Petitioner was ordered to either: (a) File a notice of withdrawal of Grounds One and  
 3 Two of the Petition, or (b) file a request to stay the proceedings and hold the Petition  
 4 in abeyance while petitioner returned to state court to exhaust his state remedies.

5 On November 17, 2014, petitioner filed a document entitled "Notice of  
 6 Petitioner's Election to Proceed With the Exhausted Claim and Invocation of Kelly  
 7 Stay Due to [28 U.S.C. § 2244(d)] One Year Limitation" ("Request for Stay"). On  
 8 January 20, 2015, after one extension of time, respondent filed an Opposition to the  
 9 Request for Stay. On February 20, 2015, the Court denied the Request for Stay and  
 10 ordered respondent to file an Answer to the Petition.

11 In accordance with the Court's Order, and after two extensions, respondent  
 12 filed an Answer to the habeas petition in May 2015, along with a supporting  
 13 memorandum of points and authorities. In June 2015, petitioner filed his traverse.

14 **In the interim, on July 1, 2015, the Ninth Circuit issued two published**  
 15 **decisions holding that a motion to stay and abey a 28 U.S.C. § 2254 habeas**  
 16 **corpus petition to exhaust claims in state court is generally (but not always)**  
 17 **dispositive of the unexhausted claims.** *See Mitchell v. Valenzuela*, 791 F.3d 1166,  
 18 1167 (9th Cir. 2015); *Bastidas v. Chappell*, 791 F.3d 1155, 1157 (9th Cir. 2015). The  
 19 Ninth Circuit found that, when the motion is dispositive, a magistrate judge "is  
 20 without authority to 'hear and determine' such a motion, but rather must submit a  
 21 report and recommendation to the district court." *Mitchell*, 791 F.3d at 1167 (citing  
 22 28 U.S.C. § 636(b)(1)(A)-(B)); *see also Mitchell*, 791 F.3d at 1170 ("[W]here the  
 23 denial of a motion to stay is effectively a denial of the ultimate relief sought, such a  
 24 motion is considered dispositive, and a magistrate judge lacks the authority to  
 25 'determine' the matter.") (quoting *SEC v. CMKM Diamonds, Inc.*, 729 F.3d 1248,  
 26 1260 (9th Cir. 2013) (citing *Reynaga v. Cammisa*, 971 F.2d 414, 416 (9th Cir. 1992)))  
 27 (alteration in *Mitchell*).

28 "As *Mitchell* explains, the interaction of *Rose v. Lundy*, 455 U.S. 509, 102 S.

1 Ct. 1198, 71 L.Ed.2d 379 (1982), which requires dismissal of a ‘mixed’ [habeas]  
 2 petition that includes unexhausted claims, and the one-year statute of limitations  
 3 enacted as part of [AEDPA], means that, once a motion to stay and abey the petition  
 4 is denied, no matter what a petitioner chooses to do, he will generally ‘lose the  
 5 opportunity ever to present [his unexhausted] claims to the federal habeas court.’”  
 6 *Bastidas*, 791 F.3d at 1163 (quoting *Mitchell*, 791 F.3d at 1172).

7  
 8 In cases in which the magistrate judge has issued an order denying a stay, the  
 9 Ninth Circuit found that “[t]he district court may consider the magistrate judge’s  
 10 order on the stay as a report and recommendation, in which case the court should  
 11 afford the parties an opportunity to lodge objections.” *Mitchell*, 791 F.3d at 1174  
 12 (citation omitted); accord *Bastidas*, 791 F.3d at 1164; see, e.g., *Daniels v. Davey*,  
 13 2015 WL 5599846 (E.D. Cal. Sept. 22, 2015) (Seng, M.J.) (noting that Magistrate  
 14 Judge had to issue R&R rather than ruling directly on habeas petitioner’s motion for  
 15 stay and abeyance).

16 **In light of these decisions, on August 25, 2015, the Court determined that**  
 17 **the Magistrate Judge’s February 20, 2015 Order denying petitioner’s request for**  
 18 **stay and abeyance had to be construed as a Report and Recommendation**  
 19 **(“2/20/15 R&R”) to which the parties could file objections. This is consistent**  
 20 **with the practice of judges in our district since the Circuit’s issuance of *Mitchell***  
 21 **earlier this year. See *Davis v. Bitter*, 2015 WL 6549118, \*3 with n.4 (C.D. Cal.**  
 22 **Aug. 25, 2015) (Kato, M.J.) (treating as an R&R the Magistrate Judge’s order finding**  
 23 **the fourth habeas claim to be unexhausted and determining that petitioner was not**  
 24 **entitled to stay and abeyance under *Rhines v. Weber*), *R&R adopted*, 2015 WL**  
 25 **6513629 (C.D. Cal. Oct. 26, 2015) (Olguin, J.); *Chacon v. Peery*, 2015 WL 5188385,**  
 26 **\*2 (C.D. Cal. Aug. 19, 2015) (Bristow, M.J.) (“In light of these recent Ninth Circuit**  
 27 **decisions, . . . the Court vacated the . . . Order [denying the habeas petitioner’s motion**  
 28 **for stay and abeyance]” and in its stead issued an R&R), *R&R adopted*, 2015 WL**

1 5190677 (C.D. Cal. Sept. 3, 2015) (Snyder, J.); *Nakhei v. Warden*, 2015 WL 5818727  
2 (C.D. Cal. Aug. 19, 2015) (Chooljian, M.J.), *R&R adopted*, 2015 WL 5768378 (C.D.  
3 Cal. Sept. 30, 2015) (Fischer, J.), *appeal filed*, No. 15-56629 (9th Cir. Oct. 20, 2015).

4 On September 21, 2015, petitioner filed Objections to the 2/20/15 R&R.  
5 Respondent had a right under Fed. R. Civ. P. 72(b)(2) to file a response to the  
6 objections within fourteen days of being served with them. That deadline elapsed  
7 a month ago on October 5, 2015, and respondent has neither filed a response nor  
8 sought an extension of time in which to do so.

9  
10 Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all the  
11 records and files herein, the 2/20/15 R&R, and petitioner's objections to said R&R.  
12 Having made a de novo determination of those portions of the 02/20/15 R&R to  
13 which objections have been made, the Court orders as follows:

14  
15 Petitioner's objections to the R&R are **OVERRULED**.

16 The Report and Recommendation is **ADOPTED**. The Court concurs with and  
17 accepts the findings, conclusions and recommendations of the Magistrate Judge.

18 Petitioner's Request for Stay is **DENIED**.

19  
20 DATED: November 23, 2015



---

21  
22 VALERIE BAKER FAIRBANK  
23 Senior United States District Judge  
24  
25  
26  
27  
28